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Whose Reparation Claims Count? Gender, History and (In)justice

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Abstract

The recognition and compensation of historic injustices is part and parcel of a politics of recognition and of socio-legal attempts of reconciliation and redemption. The notion of 'restorative justice' has recently gained political salience by invoking national governments to face and deal with historical injustice and often judicial recourse is used as a means to redress, through legislation, the legacy of historical wrongs in which democratic nation states have been implicated. At least, it would appear so when considering the proliferation of apologies and reparations issued in recent years on behalf of public bodies. Yet despite a proliferation of apologies, memorials, commemorations and other means of dealing with past practices, some claims for reparation regarding historic wrongs remain unaddressed, unsuccessful or unheard. The article analyses discourses of eugenic legacies and restorative justice claims using a gender sensitive perspective and examines reparation claims in relation to coerced sterilisations comparing Switzerland with Sweden and several states in the United States.

Key words: reparation, justice, coerced sterilisation, eugenics, time, history

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True reconciliation does not consist in merely forgetting the past.

Nelson Mandela, 7 January 1996

1.0 INTRODUCTION AND OVERVIEW

Contemporary democracies seem to be faced with political, juridical and ethical questions about their relations to the past and the resulting obligations, particularly with regard to the maintenance of meanings of a democratic future. Thus, the central role that reparations have played in recent transitions to democracy in South Africa, but also Latin America and elsewhere can be taken as a signifier of that collective act of pausing, reflecting and accounting for past actions to then find ways of moving into the future. While these debates have often been framed in relation to transitional justice in post-conflict democracies, the historic wrongs that have occurred in countries with an established democratic tradition should be of equal interest, and subjected to a critical gender-sensitive inquiry. The following article asks how eugenically motivated coerced sterilisations are the subject of contemporary reparation claims and whether feminist theories of transitional justice and reparations can be usefully brought to bear on interpreting these different historic injustice claims. The paper draws on theories of justice and reparations in order to query whether we find ourselves in new situations of 'abnormal justice' - concurrently dealing with redistribution, recognition and representation - not just at the time of *wrong doing* but also in contemporary struggles around reparation, understood as a contested set of ideas about recognition, acknowledgment, apologies and financial redress for past injustices.¹

There has been a proliferation of the 'memory industry', with apologies for historic wrongs constituting an important element in the production of historical memory.² Alexandra Stern's seminal work on American eugenics argues that apologies are central to the production of historical memory of eugenics in the United States, yet as

¹ Fraser Nancy *Scales of Justice: Reimagining Political Space in a Globalized World* Columbia University Press New York 2009; See also Fraser Nancy and Honneth Axel *Redistribution or Recognition? A Political-Philosophical Exchange* Verso London 2003.

² Marrus Michael 'Official Apologies and the Quest for Historical Justice' (2007) 6 *Journal of Human Rights* 75; See also Barkan Elazar and Karn Alexander *Taking Wrongs Seriously: Apologies and Reconciliation*. Stanford University Press Stanford 2006; Karn Alexander *Amending the Past: Europe's Holocaust Commissions and the Right to History* Wisconsin University Press Wisconsin 2015.

mnemonic acts which position the past, present, and future they also 'necessarily privilege certain historical plotlines over others'.³ Recognising historic injustice and allowing public discourses about possible forms of reparation have received significant public as well as academic interest in the past few years. Yet public discourses of past practices should not merely be seen in the context of corrective history, or in the realm of judicial discourses about corrective justice. Instead, the suggestion here is that compensation claims regarding involuntary sterilisation need to be contextualised as a powerful collision between history, politics, law and the media and thereby provide a platform for a socio-legal examination. Moreover, looking specifically at the (predominantly) gendered practice of coerced sterilisation, this article examines how established democracies⁴ deal with reparation claims with what Rubio-Marín calls 'Sexual and Reproductive Violence' (SRV).⁵

The way in which contemporary societies deal with historical practices through contemporary claims for reparations has ramifications for the notion of biopolitics and its associated social, legal and political heritage. The old biopolitics, such as eugenics is often seen, may no longer be in the immediate arena of administration of public health in Western nations but it remains a public issue through various political struggles to redress historical injustices emanating from eugenic practices. Eugenics has been put forward as a primary example of biopolitics by Foucault with its disciplining of individual bodies and regulations of the body collective of the population.⁶ Yet parallel to the uncovering of national eugenic histories during the twentieth century there has also been increasing interest in the role of redress and reconciliation in relation to historical injustices towards the end of the last millennium, indicating that biopolitics of the past bears socio-political relevance to our contemporary world. Ideas of redress and reparations have influenced renewed debates over reparations for slavery in the

³ Stern Alexandra Minna 'Eugenics and Historical Memory in America' (2005) 3 *History Compass* 1.

⁴ The term established democracies is used here to denote nation states which have a history of democracy reaching back to modernity and it is used in contrast to the idea of post-conflict democracies.

⁵ Rubio-Marín Ruth (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* Cambridge University Press Cambridge 2009. See also, Rubio-Marín and de Greiff, 'Women and Reparations' (2007) 1 *International Journal of Transitional Justice* 318.

⁶ Foucault Michel *The Will to Knowledge: The History of Sexuality Volume I*. Trans. by R. Hurley Penguin London 1978 [1976] at 139.

United States, or the official apology and the monetary awards extended by the United States government to Japanese Americans illegally interned during World War II. They have also shaped the success of reparation lawsuits against Swiss banks, European insurance companies, and German corporations for harms inflicted in the Nazi past⁷ and are being brought into discussions for compensation regarding eugenic practices such as coerced sterilisations, or the forced removal of children.⁸ However, compensation and reparation are not synonymous and furthermore, reparation is perhaps best seen as a process rather than an event. The numerous forms of reparations are outlined in detail by the United Nations Human Rights Committee and include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁹

The paper begins by providing an overview of emerging reparation claims with regards to past practices of coerced sterilisation before mapping eugenic practices and thinking within the concept of bio-politics. After contextualising contemporary reparation claims with a 'genealogy of the present'¹⁰ the next section offers theoretical approaches to justice and reparations. Finally, due to their concurrency developments in Sweden and Switzerland are compared in order to examine similarities and differences in relation to gendered reparation claims and reproductive justice.

2.0 MEDIATISATION OF HISTORIC WRONGS

Debates about reparations for eugenic practices, particularly in relation to compensation demands for involuntary sterilisations, have witnessed an upsurge since

⁷ McCarthy Thomas 'Coming to Terms with our Past: On the Morality and Politics of Reparations for Slavery' (2004) 32 *Political Theory* 750.

⁸ Although sterilisations and removal of children were qualitatively different in character, with one being a medical technology and the other not, they were both informed by eugenic thinking. Eugenics comprised both *negative* and *positive* eugenics, that is, both the thinking and the practices which aimed to prevent *unworthy* offspring through interventions as well as the thinking and measures which were directive or advisory in character and which aimed at educating the *worthy* sections of society into appropriate reproductive behaviour.

⁹ Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, UN Human Rights Committee, 56th meeting, Ch XI, E/CN.4/2005.L.10/Add.11 [BPG].

¹⁰ Visker Rudi *Michel Foucault: Genealogy as Critique* Verso London 1995.

the millennium. Since 1997, a series of prominent media scandals concerning eugenic practices in some US states, Sweden and Switzerland have made national and international headlines and prompted a socio-legal discussion about redress.¹¹ In the Swedish case, Maija Runcis' thesis (published in 1998) that examined sterilisation policies in Sweden generated considerable interest and concern throughout Europe's popular and scientific press in 1997.¹² Although social historians had been previously aware of this, the media and public alike were shocked to discover that part of Sweden's 'prophylactic social welfare policy' aimed at preventing social problems, rather than compensating for them, through practices such as eugenic sterilisation.¹³

Runcis highlighted that between 1934 and 1976 in Sweden over 60,000 people were sterilized – sometimes by force but often by persuasion and notably overwhelmingly women.¹⁴ In Switzerland, a government report was published in 1998 on the notorious *Kinder der Landstrasse* ('Children of the Country Roads') program. This officially confirmed earlier reported claims that had led to the closing down of the project and which eventually resulted in a formal apology of the government.¹⁵ Described by the then President of the Confederation, Ruth Dreifuss, as 'one of the darkest chapters in Swiss modern history',¹⁶ the program of the agency *Pro Juventute* was partly government funded and removed over six hundred *Jenisch* (or Yeniche, the main group of nomadic people within Switzerland or Europe) children from their parents, to be raised in orphanages, foster families and psychiatric institutions between 1926 and 1973. It aimed at eliminating vagrancy but also to eradicate *Jenisch* culture as its

¹¹ 'Europe's Taboo, Sterilization, Out of the Shadows', *Chicago Tribune* 28 August 1997, available at: http://articles.chicagotribune.com/1997-08-28/news/9708280294_1_sterilisations-handicapped-nazi-dictator-adolf-hitler.

¹² Weindling Paul 'International Eugenics: Swedish Sterilisation in Context' (1999) 24 *Scandinavian Journal of History* 179.

¹³ Kulawik Teresa 'The Nordic Model of the Welfare State and the Trouble with a Critical Perspective', Keynote lecture presented at the International Conference in Nordic Studies - Norden at the Crossroads Helsinki 2002.

¹⁴ Maija Runcis, 'Striden om historien', in Peter Aronsson (ed) *Makten över minnet : historiekultur i förändring* Studentlitteratur Lund 2000; see also Mattias Tydén 'The Scandinavian States: Reformed Eugenics Applied' in Bashford Alison and Levine Philippa (eds) *The Oxford Handbook of the History of Eugenics* Oxford University Press Oxford 2010.

¹⁵ Leimgruber Walter Meier Thomas and Sablonier Roger *Das Hilfswerk für die Kinder der Landstrasse. Historische Studie aufgrund der Akten der Stiftung Pro Juventute im Schweizerischen Bundesarchiv* Bundesarchiv Dossier 9 Bern 1998.

¹⁶ Leimgruber et al 1998 as above at 1.

explicit aims were, in the words of its founding father Alfred Siegfried, to prevent the Jenisch from 'reproducing without restraints and bringing new generations of degenerate and abnormal children into the world'.¹⁷

Swiss eugenic history was not new to social historians as a number of studies since the early 1990s attest to.¹⁸ But following the 'Nazi Gold' scandal, which had revealed that Swiss banks profited from Nazi crimes, it further shook the foundations of Swiss identity, in particular, its (self-) image as a neutral nation driven by humanitarian aims and social justice. Furthermore, it exposed a nation, whose political institutions of direct democracy and federalism were devised to allow for the expression and protection of cultural 'differences' within its borders, to have behaved discriminatory and damagingly towards particular groups, thereby contributing to their continuous marginalisation. Different reactions to national pasts, such as Sweden, which was quick to launch a process of compensation following apologies from the then Swedish government, suggest the necessity to consider issues of redress and reconciliation in relation to eugenic pasts. Switzerland, by contrast, decided not to adopt legislation for compensation in December 2004.¹⁹ In the U.S. meanwhile, a 'discursive architecture of apologies'²⁰ has been mounted in relation to involuntary sterilisations, with state governors of Virginia, Oregon, North Carolina, South Carolina, and California apologising for past practices since 2002. In the following, I will outline briefly the context of eugenics and involuntary sterilisation before examining a number of reparation claims juxtaposing the Swedish and the Swiss case.

3.0 EUGENIC UPTOPIA AND BIOPOLITICS

¹⁷ Leimgruber et al 1998 as above at 1.

¹⁸ See, for instance, Heller Geneviève Jeanmonod Gilles and Gasser Jacques *Rejetées, rebelles, mal adaptées: Débats sur l'eugénisme - Pratiques de la stérilisation non volontaire en Suisse romande au XXe siècle* Georg Editeur Geneva 2002; Huonker Thomas *Diagnose: 'Moralisch Defekt'. Kastration, Sterilisation und Rassenhygiene im Dienst der Schweizer Sozialpolitik und Psychiatrie 1890-1970* Orell Füssli Verlag Zurich 2003; Keller Christoph *Der Schädelvermesser. Otto Schlaginhaufen - Anthropologe und Rassenhygieniker. Eine biographische Reportage* Limmat Verlag Zürich 1995; Mottier Véronique 'Narratives of National Identity: Sexuality, Race, and the Swiss "Dream of Order"' (2000) 26 *Swiss Journal of Sociology* 533; Wecker Regina 'Eugenik - individueller Ausschluss und nationaler Konsens' in Guex Sebastien et al. (eds) *Krisen und Stabilisierung: Die Schweiz in der Zwischenkriegszeit* Chronos Zürich (1998) 165; amongst others.

¹⁹ <https://www.bj.admin.ch/bj/de/home/gesellschaft/gesetzgebung/archiv/sterilisation.html>

²⁰ Stern 2005 as above at 3.

Eugenics was hugely influential in modernising societies in its many different forms since the late nineteenth century and is seen to have constituted a mainstream body of thinking across Western nations, which constituted themselves through a 'quest for order'.²¹ Underpinned by science and reason, modernising nations sought to create and maintain social and political order, no longer seen as *natural*, through the design, engineering and management of existence. In that pursuit, eugenics offered not just a scientific analysis of existing social problems but also strategies to solve these problems presented in the name of rationality and targeted the regulation of the population's reproductive sexuality.²²

Within discourses about threats to the nation's health, sexuality and gender, in conjunction with particular ideas about physical and mental abilities, came to constitute an axis of intervention. On these premises, eugenics became an approach and a tool to rationalise the management of the population's health, especially through the governance of reproductive sexuality, particularly women's sexuality. Many of the discussions focus on the differences between *voluntary* and *forced* sterilisation and the legal basis for either or both, yet relatively little is said about the fact that these did not constitute two ends of a continuum.²³ Indeed, as both the Swiss and the Swedish case show, *voluntariness* to consent was upheld as a principle even though actual practices point clearly to pressures and/or threats under which consent was given. In addition, a closer look at the contexts of sterilisations reveals that they were often embedded in a complex catalogue of interventions and built upon existing social and political inequalities and gender regimes.²⁴

²¹ Bauman Zygmunt *Modernity and the Holocaust* Polity Press Cambridge 1989; Mottier 2000 as above.

²² Gilroy Paul *The Black Atlantic: Modernity and Double Consciousness* Harvard University Press Cambridge 1995; Kevles Daniel *In the Name of Eugenics* University of California Press Berkeley 1995.

²³ Missa Jean-Noël "'L'individu n'est rien, l'espèce est tout": analyse historique de l'évolution de la question de l'eugénisme au XXe siècle' in J.-N. Missa (ed) *De l'eugénisme d'Etat à l'eugénisme privé* de Boeck Bruxelles 1999 p 9; Porter Dorothy 'Eugenics and the Sterilisation Debate in Sweden before World War II' (1999) 24 *Scandinavian Journal of History* 145.

²⁴ Gerodetti Natalia 'From Science to Social Technology – Eugenics and Politics in the Twentieth Century' (2006) 13 *Social Politics: International Studies in Gender, State and Society* 59.

As for the legality of sterilisation, Sweden had two national laws (from 1934 and 1941)²⁵ whereas in Switzerland, only the regional jurisdiction (Vaud) had a law on sterilisation from 1928 until 1985, with Bern having a directive (in 1931).²⁶ The Vaudois law, however, served to effectively curtail eugenicists' efforts to apply the law more widely, and sterilisation practices have been more prevalent in localities where psychiatrists were left to their own devices.²⁷ Criminal Law provisions were highly contested among psychiatrists who mostly preferred making more use of Civil Law legislation, which ultimately proved more useful to psychiatrists in maintaining their role as *gatekeepers* of reproductive sexuality. The absence of a specific legal framework has, however, particular ramifications for contemporary reparation claims, as I will show later.

Eugenic practices were directed at changing the trajectory of the perceived dysgenic future and create instead a utopian future society. As such, the idea of prevention is crucial to eugenics while at the same time, the effects of eugenic thinking and practices were always firmly located in the future, that is, present day society. Eugenics was thus always imbued with a temporal dimension, so that questions of time, that is, the relationship between past, present and future is by no means crossed for the first time by contemporary reparation claims. Foucault has compellingly shown throughout his work that genealogy is important to our conceptualisation of the contemporary world when he made a general and conceptual argument about the role of history in the present.²⁸ The interest here is not in how eugenics' legacy is being reconfigured,

²⁵ Enligt lagen (1934: 171) and Enligt Lagen (1941: 282) https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1999332-om-ersattning-till-steriliserade-i_sfs-1999-332. See also Broberg Gunnar and Tyden Mattias 'Eugenics in Sweden: Efficient Care' in Broberg and Roll-Hansen (eds) *Eugenics and the Welfare State: Sterilisation Policy in Denmark, Sweden, Norway, and Finland* Michigan State Press Michigan 1996 p 77.

²⁶ For Vaud:

http://www.publidoc.vd.ch/guestDownload/direct/Texte%20adopté%20par%20CE.pdf?path=/Comp any%20Home/VD/CHANC/SIEL/antilope/objet/CEGC/Rapport%20du%20CE/2013/09/439671_269_Texte%20adopté%20par%20CE_20151210_1220528.pdf

for Bern: <http://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10031259>

²⁷ Medical personnel were reportedly glad about the absence of a legislative framework as it allowed them to conduct interventions without formal applications to health boards and only with the consent of the person and/or guardian which they felt was easy enough to obtain. For a full discussion see Gerodetti Natalia, 'Unter besonders günstigen Verhältnissen arbeiten'. Eugenic Thinking and Practice in Switzerland' in Westermann Stephanie, Kühl Richard and Gross Dominik (eds) *Medizin im Dienste der Erbgesundheit: Beiträge zur Geschichte der Eugenik und Rassenhygiene* Literatur Verlag Berlin 2009 p 79.

²⁸ Visker 1995 as above.

continued and discontinued in contemporary genetic politics, but in examining how the history of eugenics is a history of the present for several reasons.²⁹ Thus, in addition to eugenics' own ideas about future, various contemporary judicial institutions are dealing with claims relating to eugenics, which makes it a present socio-political dilemma. That is, eugenics does, by means of invoking calls for reparation and therefore law as a mechanism of regulatory power, impact on contemporary politics and thus has a complex temporal impact.

Thus, in calls for reparation, the utopias of history form a central temporal axis. Before examining the gender-specific historic injustices around coerced sterilisations, it is helpful to outline some of the work on reparation and transitional justice and deal with its principles and strategies for implementation.³⁰

4.0 JUSTICE AND REPARATIONS

Redressing past wrongs is seen as essential to establishing conditions of justice in societies scarred by the enduring and pervasive effects of those wrongs. This is particularly pertinent where perpetrators of those wrongs include continuing corporate agents in the broad sense of bodies recognised in law as incorporated, such as states, firms, and other public and private institutions, such as welfare agencies or psychiatric units, and when those affected are large groups of individuals who were harmed precisely as members of a specific group, such as *the mentally deficient* or *anormals*. The ultimate aim is to involve national governments in redressing the legacy of injustice through legislation but also through court proceedings.

Based on the principles of corrective or rectificatory justice, and in as much as it is practically possible and morally permissible, the correction of a legacy of past injustices is thought to be a moral-political requirement for enduring *corporate agents*, such as

²⁹ Visker 1995 as above.

³⁰ See, for instance, Thompson Janna *Taking Responsibility for the Past: Reparation and Historical Injustice* Polity Cambridge 2002; Torpey John (ed) *Politics and the Past: On Repairing Historical Injustices* Rowman and Littlefield Lanham 2003.

states. The principle of collective responsibility emerges from ideas about collective citizenship in that each generation of citizens not only inherits *the rights of membership*, although critical theorists have long pointed to the fact that citizenship rights have not been bestowed equally upon members, but also that each generation inherits *the burdens of membership*. National debts, be they financial or cultural, accrue to the political community as a whole either because they were state sanctioned and implemented or because state members collectively benefited so that by the same logic they ought to share inherited liabilities.³¹

The aim of corrective justice is not to relegate dealings with past injustices to the realm of guilt but to see collective responsibility as an element of a more complex narrative within 'the history of a relationship'.³² Embedded in that notion is the perception that material reparations are not the only or primary form of reparation and that symbolic measures can be equally effective, consisting of public acknowledgement and public apologies, times and places of official commemoration, museums and exhibitions, revised textbooks and curricula, a strengthening of civic trust and solidarity and so on. Discourses on reconciliation warn against perceiving restoration as the object of reparative justice, but are also wary of the tendency to devolve into 'justice as the demands of the victim'.³³ While the depths of the body of literature on reparative justice is beyond the purposes of this article, the elements it does wish to dwell on are the two forms of reparation alluded to above, that is, material and symbolic forms of reparation for past injustices in the context of eugenics.

Similarly this article does not seek to undertake a comprehensive theorizing or reviewing of feminist transitional justice but I want to, nevertheless, draw out several important contributions. Transitional justice paradigms have been much enriched by a body of feminist theorizing, which posits gender and feminist thinking within its

³¹ McCarthy 2004 as above.

³² McCarthy 2004 as above at 760.

³³ Thompson 2002 as above.

analysis.³⁴ Within transitional justice, reparations are seen to be constituted by material and symbolic redress to victims of human rights violations in the aftermath of widespread political violence. The historic wrongs affecting women in the case studies considered here did not happen against the backdrop of widespread political violence and moreover they do not affect a group of women who has built a strong sense of community or solidarity in the aftermath of the experienced wrong doing.

Nevertheless, the experience of coerced sterilisations constitutes, in Rubio-Marín's terms, a form of SRV.³⁵ Rubio-Marín subsumes forced sterilisations under the catalogue of practices of SRV and although her work is more explicitly on reparations in transitional justice contexts of post-conflict nations, her categorization is nevertheless a useful one here.³⁶ Coerced sterilisation is not only a violation of someone's bodily integrity at the point of intervention but, crucially, locates its effect in the future by depriving women of the possibility of motherhood. Given that motherhood is a strong component of normative expectations of femininity - and thus identity and belonging to society - I propose that even within a non-post conflict country coerced sterilisation can be aptly contextualized as a form of SRV.

Furthermore, both Rubio-Marín and Margaret Urban Walker identify the impact that normative concepts of masculinity and femininity have on the nature of violence committed and the reparations process that follows. In distinguishing violence against women before, during and after conflict Walker argues that before conflict - and thus also useful for non-conflict situations such as democratic societies - violence against women is normative, accepted and ordered.³⁷ The idea of 'gendered harm' has thus been developed by O'Rourke to draw attention to the specificities that arise from

³⁴ O'Rourke Catherine *Gender Politics in Transitional Justice* Routledge London 2013; Painter Genevieve Renard 'Thinking Past Rights: Towards Feminist Theories of Reparations' (2012) 30 *Windsor Yearbook of Access to Justice* 1.

³⁵ Rubio-Marín 2009 as above at 4.

³⁶ Rubio-Marín Ruth 'Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue', 69 *William & Mary Journal of Women & Law* (2012) at 19.

³⁷ Rubio-Marín Ruth (ed) *The Gender of Reparations. Unsettling Sexual Hierarchies while Redressing Human Rights Violations* Cambridge University Press Cambridge 2009; Urban Walker Margaret 'Gender and Violence in Focus: A Background for Gender Justice in Reparations' in Rubio-Marín 2009 as above at 22.

violations that women experience.³⁸ O'Rourke also develops a notion of gendered harm which draws attention to the connection of (legally recognized) gendered harm and (non-legally-recognized) gender regimes and normativities existing within societies. She uses the notion of 'web of gender-based harms'³⁹ to point to the interconnection of both the harm experienced during conflict and the effects of gender regimes in pre and post conflict society while Rubio-Marín draws a similar connection by examining gender based harm within the long transition from pre to post conflict society.⁴⁰

What is important to draw out here is that the harms experienced by women - when they are sexual and reproductive harms - continue to have an impact on women's experiences by framing their perceptions and status within their communities as 'spoiled identity'.⁴¹ Sexual and reproductive violence is typically accompanied by 'social and symbolic multipliers of harm',⁴² in the form of stigma, ostracism, and rejection by actual or potential partners and family members. Through these social effects the 'original violation is extended, ramified, and augmented in multiple ways that significantly alter the women's physical safety and well-being, social reintegration and status, economic survival, and eligibility for marriage'.⁴³

Reproductive violations are therefore continuous violations with both primary reproductive violation as well as consequent reactions from surrounding people and communities.⁴⁴ Such reactions add to the negative experience and not only comprehensively render victims stained or spoiled but also devalued. Drawing on Goffman's stigmatization works by comprehensively 'spoiling identities' which separates the stigmatized person from society and from herself through a process

³⁸ O'Rourke 2013 as above at 37.

³⁹ O'Rourke 2013 as above at 37.

⁴⁰ Rubio-Marín 2012 as above.

⁴¹ Goffman Erving *Stigma: Notes on the Management of Spoiled Identity* Penguin Harmondsworth 1990 [1963] at 3.

⁴² Rubio-Marín 2009 as above at 28 and 29.

⁴³ Margaret Urban Walker 'Gender and Violence in Focus: A Background for Gender Justice in Reparations' in Rubio-Marín Ruth (ed) *The Gender of Reparations. Unsettling Sexual Hierarchies while Redressing Human Rights Violations* Cambridge University Press Cambridge 2009 at 31.

⁴⁴ The reproductive violations involved in coerced sterilisations have been shown to have been linked to other practices such as granting abortions upon consenting to sterilisations, or the receipt of a marriage licence only upon agreeing to a sterilisation.

whereby the person is perceived as less than human, or not as worthy as others. Read against the backdrop of normative constructions of women and femininity through marriage and even more so motherhood,⁴⁵ the idea of *spoiled identity* has particular pertinence to women whose reproductive abilities have been curtailed resulting in various forms of stigma management for the person.⁴⁶ While for those affected by historic sterilisation practices this may lie in the past, it is important to acknowledge the enduring effects of both primary and secondary violations that have occurred.

5.0 RECONCILIATING EUGENIC PASTS

Coming to terms with eugenic pasts has resulted in a number of politico-legal struggles, which have sought to reconcile coerced sterilisations. A number of US states, such as Virginia (2002), Oregon (2002), North Carolina (2002) and California (2003)⁴⁷ have produced apologies for their sterilisation practices which have been interpreted as the acceptance of some form of accountability for past eugenic policies and measures.⁴⁸ Redress in the form of financial compensation, however, arrived only a decade later in North Carolina (2013)⁴⁹ and Virginia (2015).⁵⁰ Sweden, equally, has undergone a public engagement with past coercive welfare practices and after a media scandal in 1997 Swedish Social Minister Margot Wallström, who only in 1996 rejected an individual application for damages for forced sterilisation, has officially apologized for the nation, saying ‘what happened was nothing but barbaric’.⁵¹

⁴⁵ See for instance Smart Carol *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality* Routledge London 1992.

⁴⁶ See also Nussbaum Martha *Hiding from Humanity: Disgust, Shame and the Law* Princeton University Press Princeton 2004.

⁴⁷ Stern 2005 at 211. ‘Virginia apologises for eugenics policy’ *BBC News* 3 May 2002; ‘Apology for Oregon Forces Sterilizations’ *Los Angeles Times* 3 December 2002; North Carolina: <https://www.uvm.edu/~lkaelber/eugenics/NC/NC.html>; ‘California: State issues Apology for Policy of Sterilization’ *Los Angeles Times* 12 March 2003.

⁴⁸ Although notably the apology was *received* by victims only in the first three states, not California.

⁴⁹ The appropriations bill can be found at <http://www.ncleg.net/sessions/2013/bills/senate/pdf/s402v7.pdf>.

⁵⁰ <http://www.dbhds.virginia.gov/individuals-and-families/sterilisation-compensation>.

⁵¹ Population Research Institute, <https://www.pop.org/content/the-knife-in-the-closet-127#sthash.Fnprbx8E.dpuf>.

The Swedish Report⁵² following the publication of a series of articles in the *Dagens Nyheter*⁵³ about the particularly gendered dimensions of coercive sterilisation also initiated international debate such as in the United States and in Switzerland. The Swedish government was swift in its response to the public reaction and set up a state commission to atone for the perceived atrocities and established that those sterilized without their consent should receive reparations.⁵⁴ The report asserted that 31,000 people were estimated to have been voluntarily sterilized. 6,000 sterilisations (ca. 10%) happened with explicit force, and 15,000 people (ca. 25%) had signed the application though many of these did so in order to be allowed an abortion or be released from an institution.⁵⁵ In a further 6000 cases (ca. 10%) there were also signs of persuasion or pressure and the remaining 4,000 cases (ca. 7%) could not be determined.⁵⁶ 93% of them were women which thus pointed to gendered aspects of eugenic administration.⁵⁷

Crucially, the report proposed that where women were 'probably' sterilised against their will, they should be awarded compensation and where the sterilisation was voluntary (since 1976) there was to be no compensation. By 2001, 2300 applications had been received and 1600 were successful, receiving an identical sum of 175,000 Swedish crowns (approx. Dollars 25,000).⁵⁸ As Leif Persson, the vice-chairman of the Swedish Sterilisation Compensation board said:

⁵² Regeringens skrivelse *Redogörelse för steriliseringsfrågan i Sverige åren 1935-1975 och regeringens åtgärder* 2000 01/73: 1-27

⁵³ For a thorough analysis of his articles and the ensuing debate, see Kroon Åsa 'Debattens dynamik: hur budskap och betydelser förvandlas i mediedebatter' (2001) 227 *Linköping studies in arts and science Linköping Tema University* 0282-9800 p 133.

⁵⁴ Regeringens 2000 as above.

⁵⁵ Many were performed during abortions, as mandatory before release from prisons or psychiatric wards, to qualify for public assistance or to avoid losing custody of children (Regeringens skrivelse 2000). Runcis (1998) argued that the original motivation to *cleanse* society of the *feeble-minded* broadened into a willingness to sterilise for socially or morally offensive behaviour. Local committees, with significant variations in implementation of the laws, sometimes chose to recommend or impose sterilisation of *gypsies*, women who could not provide for numerous children, or sexually promiscuous women.

⁵⁶ Regeringens 2000 as above at 13.

⁵⁷ Runcis Maja *Steriliseringar i folkshemmet* [Sterilisation in the Swedish Welfare State]. Ordfront Stockholm 1998; Regeringens 2000 as above.

⁵⁸ Johansson Karin '1600 tvångssteriliserade har fått skadestånd' *Sydsvenskan* April 2005 available at <http://www.sydsvenskan.se/sverige/1-600-tvangssteriliserade-har-fatt-skadestand/>.

It is a symbolic gesture to make up for past wrongs. The laws between 1941 and 1975 said that sterilisations must be voluntary, but we know that many people were sterilised against their will.⁵⁹

However, while the Swedish decision of 1999 to compensate those affected by past eugenic practices was productive of a discourse (both political and mass media) about the history of sterilisations elsewhere, Lene Koch has also argued that the motivation behind this was more a historiography of indignation rather than a historiography of eugenics. In other words, while Sweden's public sphere was almost unanimously agreed on the need to compensate it saw less of a need to search for a thorough reconstruction of the past. An imperative to produce further historical studies on Sweden's past was not commissioned until 2005 and its purpose was to provide 'supportive documentation for a discussion concerning the values of the Society and State actions'.⁶⁰ In Koch's view, the media was instrumental in cajoling Swedish politicians to take action and was an expression of politicizing and moralizing attitude towards the past to serve contemporary interests. Underpinning the Swedish discussions and subsequent strategy was a wish to atone quickly and move on from the uncomfortable history so hard to reconcile with the image of a caring welfare state.

When the Swedish inquiry faced its uncomfortable history and set up a compensation package the commission head Carl-Gustaf Andren argued that payment could not be regarded as true compensation for involuntary sterilisation but that it would provide 'concrete and visible evidence of personal redress, an expression of taking a stand against and regretting what took place'.⁶¹ The report refrained from accusing individuals but held that passivity and silence of politicians and loose interpretations of sterilisation laws by medical authorities enabled the operations to be forced on people.

⁵⁹ 'Sweden pays sterilisation victims' *Deseret News* 1 November 1999 at 6.

⁶⁰ Koch Lene 'On Ethics, Scientist, and Democracy: Writing the History of Eugenic Sterilisation' in Doel Ronald and Söderqvist Thomas (eds) *A Historiography of Contemporary Science, Technology and Medicine: Writing Recent Science* Routledge London 2006 p 81 at 84.

⁶¹ 'Sterilization victims ought to be paid: panel' *The Daily Gazette* (New York) 27 January 1999 at 15.

6.0 EUGENICS AND DIFFERENT POLITICS OF REDEMPTION

Prompted by the Swedish case and emerging research into Swiss eugenic practices, the Swiss government was equally faced with a reparation claim for coerced sterilisation in 1999. First articulated as a postulate in Parliament in 1997, a formal parliamentary initiative was submitted in 1999, forcing political engagement.⁶² The outcome of the lengthy democratic process was the decree of national legislation regulating sterilisation in future, and a rejection of the proposal for compensation in December 2004.⁶³ Despite an initial welcoming, the Federal Council paved the way for the final rejection of compensation measures with its position paper in 2003.⁶⁴ It contained an acknowledgment of the need to critically question as well as recognise the perhaps 'darker sides of recent social history' (as the government did with the previous, eugenically related 'Children of the Country Road' program). The position paper conceded that sterilisations were partly based on 'eugenic reasons, in conjunction with social-hygienic or socio-economic goals, and partly they were taken in the presumed interest of the person concerned'.⁶⁵ But the position paper was wary of discussing compensation arguing that moral values and ethics as well as the conception of psychiatry and rights to sexuality had changed significantly in the past hundred years and it would be inappropriate to judge past practices on the basis of contemporary values.⁶⁶

⁶² In both Sweden and Switzerland the political engagement was launched within parliament though in Sweden much more sharply against the backdrop of the international media scandal. In Switzerland, there was no parallel media attention.

⁶³ Margrith von Felten submitted the parliamentary initiative in 1999 (99.451) which the legal commission of the National Council (RK-N) decided to follow and draft a law for compensation in 2000. This draft was submitted to a consultation process in during 2002 and resulted in a two part law: the first regulating the future legal basis for sterilisations in accordance with Convention on Human Rights and Biomedicine by the Council of Europe, ETS Nr 164, 1999 and the second creating a legal basis for compensation and redress.

⁶⁴ Stellungnahme Bundesrat (SB) *Parlamentarische Initiative Zwangssterilisation. Entschädigung für Opfer (von Felten). Bericht der Kommission für Rechtsfrage des Nationalrates vom 23. Juni 2003*, 99.451: 6355-6368.

⁶⁵ SB as above at 6356.

⁶⁶ This social change in attitudes, the Federal Council stipulated, could not only be seen in relation to disabled people's rights to sexuality but also in changing legislation on welfare measures such as administrative internment.

After a lengthy parliamentary debate, the rejection of a compensation scheme in cases of involuntary sterilisation centred around three key areas of contestation. First, the absence of a national legal framework on sterilisation which was argued to affect the legal responsibility of the government. Recurrence to existing provisions for compensation in cases of criminal injury (Victims Compensation Law, *Opferhilfegesetz OHG*, 1991) were thought to be non-applicable as none of the sterilisations had violated a criminal code and were therefore illegal. Second, it was argued that in the absence of national legislation and the fact that welfare administration was a cantonal matter and the federal government neither could nor should be held accountable. Furthermore, ascertaining with clarity whether sterilisations were fulfilling the condition of 'coercion' was deemed to be 'extremely difficult' hindering therefore a proper assessment of potential applications. In addition, it was thought that the extent of the problem was unclear due to incomplete historical research:

It can be concluded from the commission report that sterilisations, which took place without informed consent, were based on different situations and practices according to each canton, physician and institution. The boundary between interventions which were evidently based on illegal coercion and whose legitimacy remains controversial today is fluid.⁶⁷

Third, it was feared that a 'dangerous precedent' would be set by installing a compensation scheme which would lead to other reconciliatory demands for past injustices and incur costs, such as in the case of administrative internments and Contract Children before the 1980s.⁶⁸ It was also argued that this would 'create

⁶⁷ Stellungnahme Bundesrat 2003 as above at 6357.

⁶⁸ Swiss welfare authorities had a range of measures at their disposal to deal with families perceived to be poor or unruly which have come to the attention of the media, the public and politicians since the late 1990s and which have some 20 years later resulted in the Reparation Initiative (*Wiedergutmachungsinitiative*) submitted in December 2014. One of these was the practice of contracting children from poor families out to farmers or placing them in families where they were often subjected to hardship and more. 15.082 Botschaft zur Volksinitiative 'Wiedergutmachung für Verdingkinder und Opfer fürsorgerischer Zwangsmassnahmen (Wiedergutmachungsinitiative)' und zum indirekten Gegenvorschlag (Bundesgesetz ueber die Aufarbeitung der fürsorgerischen Zwangsmassnahmen und Fremdplatzierungen vor 1981) BBL 2016 101 <https://www.admin.ch/opc/de/federal-gazette/2016/101.pdf>

different categories of victims of past injustices' - some of which would be compensated and others not - and there was an additional fear voiced that esteemed figures from the past may (retrospectively) be held accountable (morally or legally) for their practices.⁶⁹ This is a narrative strategy that Schürer calls 'adventurous', given this is legally not possible.⁷⁰ This desire not to judge historical actors acclaimed a rather curious prominence in Federal Council Blocher's (Minister of Justice at the time) final speech to parliamentarians:

I will tell you: you should reject this also from the heart. It is not merely a juridical question. It is also about people who have in the past acted for socially legitimate reasons and whom you would now condemn for their socially motivated actions.⁷¹

The final draft had incorporated earlier concerns from the Federal Council and what was presented to a parliamentary discussion was a proposal which had dropped the entitlement of compensation (the proposed 80,000 Sfr) in favour of a symbolic gesture (5,000 Sfr), questioning both the principle of compensation and the amount itself. While initially the National Council was supportive in March 2004, in December 2004 they concurred with the Council of States' rejection.⁷² In the following section, some of the narratives and rationales are examined in more detail.

6.1 *Avoiding Precedents, Avoiding National Responsibility*

The Federal Council and the majority of Parliament were strongly driven by legal questions and argued that neither the Victims Compensation Law (OHG)⁷³ could be

⁶⁹ It was argued that past events should not be judged by present ethical standards which would only do injustice to those individuals who, at the time, acted in the interest of society and on the basis of prevalent social norms.

⁷⁰ Schürer Stefan *Die Verfassung im Zeichen historischer Gerechtigkeit. Schweizer Vergangenheitsbewältigung zwischen Wiedergutmachung und Politik mit der Geschichte* Chronos Zürich 2009 at 297.

⁷¹ BBI 2004 7265 Blocher.

⁷² This despite an attempt by a group of historians who lobbied parliament to adopt a reparation law after the rejection. BBI 2004 7265 Menétrey-Savary.

⁷³ Bundesgesetz über die Hilfe an Opfer von Straftaten (Opferhilfegesetz, OHG) 2007 312.5 <https://www.admin.ch/opc/de/classified-compilation/20041159/index.html>

applicable nor that a violation of basic human rights was at stake because of the historicity of the concepts itself. Furthermore, the principle of equality in law would be injured by setting a precedent for one group of people as others could equally launch claims for reparation for historic injustice such as victims of administrative internments,⁷⁴ those abused in orphanages and victims of other child welfare measures from the past. As a result, in 2004 Swiss politicians attempted to discursively establish a notion of historical legacy and collective responsibility that lasted merely two years.⁷⁵

However, reparation (as symbolic and material gesture) had been established previously with the compensations programme for the victims of the 'Children of the Country Road' program, a privately initiated but state supported program which systematically removed children from Yeniche families to place them in residential or foster care.⁷⁶ That reparation debate resulted in the establishment of a Foundation, which was to issue 'solidarity payments', and thus equally avoided the principle of compensation entitlement.⁷⁷ This reparation process, however, was felt by victims to lack proper satisfaction and rehabilitation both in the decision not to install a principle of compensation, in the administration of the solidarity payments and in the political avoidance of public acknowledgment and recognition.⁷⁸

The position paper on coerced sterilisations recognized the principle of 'recognition owed' but at the same time tried to avert additional financial obligation:⁷⁹

We would not want to diminish the personal trajectories resulting from practices that today would be considered unacceptable. But these practices have to be contemplated in the context of a continuously developing society in which we learn from mistakes and injustices of the past. The recognition which society owes

⁷⁴ Administrative internment (*administrative Versorgung*) was a means of effecting imprisonment on the basis of the Swiss Civil Code of 1912 rather than through criminal law which had led to widespread abuses of the system in the early parts of the twentieth century, such as in cases of Contract Children.

⁷⁵ AB 2004 N 251 BR Blocher.

⁷⁶ Huonker 2003 as above.

⁷⁷ AB 2004 N 251 BR Blocher.

⁷⁸ Leimgruber et al as above at 11.

⁷⁹ Stellungnahme Bundesrat 2003 at 6359.

to victims of coerced sterilisation does not necessarily need to be in the form of financial compensation (for many victims this would come too late anyway). Instead of continuously trying to compensate for past injustices, and thereby open old wounds, we prefer to use existing means to support people with cognitive disabilities or who have psychological and social difficulties and who need care in an institution or other institutional support.⁸⁰

The *continuous* attempts to compensate referred, once again, to the *Pro Juventute* practice and the 'Children of the Country Roads' compensation but also to the case of haemophiliacs where responsibility was acknowledged.⁸¹ The phrasing suggests that, contrary to the professed *recognition owed*, there was actually a strong resentment towards the idea of atonement or making amends for past injustices and an attempt to contextualise, perhaps even hide away, support for people within existing welfare structures. In its argumentation, the position paper also implicitly rejected the notion that victims of coerced sterilisations might have undergone two forms of injury: the coerced sterilisation itself as well as the ensuing stigmatization and management of a *spoiled identity*. Furthermore, it assumes a contemporary notion of *mental ability* to those affected when historical work comprehensively shows that *mental deficiencies* were in fact enmeshed with various marginalized identities.

The reluctance to engage with ideas of responsibility is, I argue, a third form of injury using the idea of reproductive violence within the life trajectory of affected women: in addition to reproductive injur(ies) and the ensuing marked life as a woman without children the rejection of reparation mechanisms constitutes an injury of the present. While there was an acknowledgement that contemporary discussions might open up healed wounds, there was no thought given to the possible effects of a possible rejection in the form of *not just opening wounds but also sticking another knife in it*. What is furthermore striking is that although the principle of *past injustice* was verbally

⁸⁰ Stellungnahme Bundesrat 2003 at 6359.

⁸¹ Swiss government also rectified its wrong doing towards those who helped refugees before and during WWII who were, according to legislation at the time, sentenced to prison. See Schürer 2009 at 298. Sozialgesetzbuch (SGB) V - Gesetzliche Krankenversicherung - Artikel 1 des Gesetzes 20 December 1988 BGBl I 2477.

acknowledged, the parliamentary discussions were so occupied with establishing whether or not legal responsibility existed there was never any proposal of an official apology.

6.2 *Unpacking Responsibility*

Any form of collective responsibility, the Federal Council held, was to be placed at local government level if parliament nevertheless decided on financial retribution, although not so much in legal terms but in social and political terms. This bears an inherent inconsistency in that the collective is both made and unmade as the bearers of responsibility. If the physicians, welfare administrators, priests and other individuals involved in welfare practices and decision making processes should not be personally held responsible because they acted according to social norms one would assume that the bigger national bio-social collective bears past and present responsibility. In other words, if these practices were part of a wider regime of care and prevention in the name of the collective then responsibility for breach of care also lay with the collective, in this case the national collective. But the Federal Council took the decision, as did the majority of parliament later, that responsibility needed to be defined more narrowly:

It is precisely unproven in the case at hand, and in contrast to the programme 'Children of the Country Roads', that the Federal Government morally, politically or financially supported forced sterilisation, which have been practiced by certain physicians and institutions.⁸²

If responsibility towards the past existed at all then it had to be laid, as did welfare administration, with cantonal governments. This argument effaced that it was a national political decision in the first place that welfare support was denominated to be a local responsibility - cantonal and communal - and that a responsibility or a burden towards the past remains incurred. It was a national-political decision *not* to include a national regulation on sterilisation in the criminal law, which was being nationalised

⁸² Stellungnahme Bundesrat 2003 at 6359.

between 1890s and 1930s and enacted in 1942. Moreover, if national legislation would have had the effect, as did the Vaudois law,⁸³ to curb numbers of sterilisation then in fact national responsibility could even more strongly be framed in terms of *not* intervening. Furthermore, the Swiss government did implicitly sanction sterilisations as part of population politics through the government's position on the family article 1944, for instance. Although eugenic arguments were discarded at the last minute from the family protection rationale the Federal Councillor Philipp Etter argued that it was not necessary to include it as such a politics could be carried out in Switzerland without constitutional basis.⁸⁴ Federal government supported eugenic goals and also never spoke against them, as members of parliament and social historians have pointed out during the discussions.⁸⁵ Interestingly, the historical commission challenging the previously national narrative of neutrality of Switzerland during WWII which was prompted by the Nazi-Gold scandal also concluded that 'collective responsibility by the state' can be defined not just by the state's actions but, crucially, by lack of action.⁸⁶

This creates, it could be argued, a much more complex premise for the attempt to relate past (legal) conditions to present responsibility yet a legalistic interpretation of the separation of past and present prevailed. Rather than using the idea of a 'critical genealogy of the present',⁸⁷ the attempt to establish whether past law, social norms and welfare practices are the principal framing of the reparation question also obscured that reparation is fundamentally attached to the present, or as Schürer argues, reparation is a problem of the present and it is a process of recognition which inevitably incurs recognising a different history and a rupture with those who had been seen as good citizens.⁸⁸

⁸³ Irrengegesetz von 1901 IV. Abschnitt Art 28 3 September 1928 concerning the sterilisation of mentally deficient people. See also Huonker 2003 as above at 141.

⁸⁴ Bundesblatt *Bericht des Bundesrates an die Bundesversammlung über das Volksbegehren 'Für die Familie' vom 10. Oktober 1944* Jahrgang 96 22 Bd I.

⁸⁵ Wecker Regina 'Der Bund hat Zwangssterilisationen begünstigt', *Basler Zeitung* 6 January 2004.

⁸⁶ UEK Unabhängige Expertenkommission Schweiz-Zweiter Weltkrieg *Die Schweiz, der Nationalsozialismus und der Zweite Weltkrieg: Schlussbericht* Pendo Zurich 2002.

⁸⁷ Visker 1995 as above.

⁸⁸ Schürer 2009 as above at 302.

The responsibility for the victims of the past is a question of the present. Past injury cannot be reversed. The victims of then, however, can be rejected again. What is at stake is thus less the past practices towards those affected than present practices.⁸⁹

In December 2004, a Reparation Bill for coerced sterilisations was rejected driven by centre and right parties who thought it wrong 'to judge the past according to today's measures and knowledge [and] to map our conception of law onto incidents which occurred in different time and under different conditions'.⁹⁰ In contrast, social democrats and greens argued for a need to acknowledge past injustices and saw it neither as a shame nor a misjudgment to retrospectively deem certain practices to be illegal and victimising. Furthermore, they contested that there was an absence of regulation and pointed out that physicians were aware of the need to obtain legally valid consent as otherwise they could be brought to justice for grievous bodily harm, though the question might be raised whether marginalised people can ever do that. Left parties emphasised that the mere absence of sentences for committing grievous bodily harm in the form of sterilisations was not indicative of their practice or its contestation.⁹¹ The position of the Federal Council, they argued, was seen to 'lack a sense of history', to be 'constitutionally insensitive and insufficient' and to constitute a form of 'legalistic sidestepping'.⁹² Vigorously contesting the majority position, Left parliamentarians argued that the reparation package of 5,000 SFr (equivalent to \$3850 in 2004) would 'merely be the bunch of flowers that comes with an apology'.⁹³ In addition, they argued that a parliamentary rejection of the proposal for compensation would legitimise the *wrongs* of the past and reiterate the victimisation and marginalisation of the people who experienced coerced sterilisations, while not mentioning that this was first and foremost women who experienced, I would argue, a

⁸⁹ Schürer 2009 as above at 301-303.

⁹⁰ AB 2004 N 246 Mathys SVP. See full chronology at:
<https://www.parlament.ch/en/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=8011>

⁹¹ Schürer 2009 as above at 301 where he lists an appeal case from 1939 in which the courts in Zurich deemed it illegal to condition the granting of a marriage license to a voluntary sterilisation.

⁹² AB 2004 N 253 Kälin SP

⁹³ AB 2004 N 253 Kälin SP

threefold form of injury: first a coerced sterilisation, second a life managing womanhood without motherhood, and third a present government that rejects them by neither issuing a clear apology nor a symbolic gesture of compensation.

6.3 *Productive Discourses*

Five years later, in November 2009, Switzerland was criticized by the United Nations Human Rights Commission in its third report ‘for not having acted “to repair the coerced castrations until 1987”. The Commission recommended that Switzerland ‘undertake reparation for historical injustice in the form of reparation including non-financial means, such as the form of an apology’⁹⁴. Interestingly, the UN text actually said:

20. The Committee is concerned at the reluctance of the State party to compensate or otherwise make reparation for forcible castrations and sterilisations conducted between 1960 and 1987(arts. 2, 7).

The State party should repair this past injustice through forms of reparation, including non-financial means, such as public apology.⁹⁵

In April 2013 a memorial event was attended by 700 people who had experienced coercive welfare measures (including former contract children, those put in administrative care and those forcibly sterilized). Federal Councillor Simonetta Sommaruga’s speech entailed an apology for the violation of people’s dignity and consequent suffering ‘in the name of a fellow citizen, as the Minister of Justice and as a member of the Federal Council of Switzerland’ adding that ‘nothing is more valuable than human dignity’.⁹⁶ Her speech – albeit brief – was clear in its intention that the memorial was not a concluding event but the beginning of a collective engagement

⁹⁴ <http://www.wiedergutmachung.ch/initiative/> at 7.

⁹⁵ Concluding Observations of the Human Rights Committee, Switzerland, U.N. Doc. CCPR/C/CHE/CO/3 (2009). <https://www1.umn.edu/humanrts/hrcommittee/switzerland2009.html>

⁹⁶ Bundesverwaltung, <https://www.news.admin.ch/message/index.html?lang=de&msg-id=48480>,

with the 'dark chapters of Switzerland's social history'.⁹⁷ Interestingly, and in stark contrast to the 2004 positioning, a clear collective guilt was acknowledged. Sommaruga stated that 'a society which does not face its past runs in the danger of repeating its mistakes' and she added:

What is at stake here is not merely about the victims and the perpetrators. It is about us all. Because looking away is also an action. Looking away and not wanting to know creates blind spots. And nothing is more dangerous for a society than blind spots.⁹⁸

The UN reprimand together with an increased research output about historical welfare measures more generally, as well as coerced sterilisation specifically, and a heightened media attention (in particular to the fate of Contract Children) has created a veritable proliferation of discourses around reparation since 2009 culminating in a public initiative in 2014 and a governmental counter-proposal for a Reparation Law in 2015 which victims of coerced sterilisations are planned to be included and which was in parliamentary discussion in April 2016.⁹⁹

7.0 CONCLUSION

Switzerland is by no means alone in its slow confrontation with past injustices. The search for a unifying principle of compensation that could reflect reparation for wrongs is now the subject of broad human rights and humanitarian concerns which includes criminal actions by the state and breaches of duty of care by state bodies. Australia, for instance, has similarly witnessed a drawn out process of acknowledgment, recognition and reparation around its history of indigenous oppression and dislocation.¹⁰⁰ An

⁹⁷ Speech Simonetta Sommaruga Gedenk Anlass für ehemalige Verdingkinder und Opfer von fürsorgerischen Zwangsmassnahmen Bern 11 April 2013. <http://www.news.admin.ch/NSBSubscriber/message/attachments/30274.pdf>

⁹⁸ Sommaruga 2013 as above.

⁹⁹ BBL 2016 155 <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20150082>.

¹⁰⁰ For example, Buti Antonio 'Reparations, Justice Theories and Stolen Generations' (2008) 34 *University of Western Australia Law Review* 168; Reilly Alex 'The Inherent Limits of the Apology to the Stolen

apology was first issued by a state government (South Australia) in 1997 and only more recently has the Federal Government and former Prime Minister Kevin Rudd apologised in 2008, followed by the Stolen Generation Compensation Bill 2008.¹⁰¹ Late 2015 a \$11 million Stolen Generation reparations fund was set up in South Australia although a national compensation scheme remains outstanding.¹⁰² The policy about removing children from their families and cultural traditions in Australia (in place until the 1970s) was based on colonial thinking about the racial inferiority of Aboriginal people and has obvious parallels with the removal of Yenisch children in Switzerland based on eugenic thinking about inferiority.¹⁰³ Thus, reparation processes in Australia, as elsewhere, are seen as crucial instruments to pursue meaningful reconciliation between the colonised and the coloniser for historic harms with enduring impact.¹⁰⁴

Refocusing on coerced sterilisations, there have been apologies as well as compensation payments in various state jurisdictions in the United States. The time lag in those jurisdictions between apology and compensation is indicative of the wider principle that reparation takes time to be implemented. The Swedish and Swiss examples, which have been considered here, have shown similarities – both were driven by politicians rather than victims – but also differences: The Swedish case was shaped significantly by the backdrop of international media attention and the concomitant questioning of its democratic basis. The Swiss case, by contrast, did not receive equivalent media attention and its querying into its past was marked by judicial battle over collective responsibility of contemporary society in the 2004 debates. That a welfare measure should so dramatically affect women negatively was a shocking foundation to the Swedish collective imagination as a democratic state. In Switzerland, by contrast, the gendered nature of coercive sterilisation was barely mentioned whereas the fear of the

Generation' *University of Adelaide Law Research Paper* No. 2009-002; Cuneen Chris 'Colonialism and Historical Injustice: Reparations for Indigenous People' (2005) 15 *Social Semiotics* 59; Hocking Barbara Ann 'Confronting the Possible Eugenics of the Past through Modern Pressures for Compensation' (2000) 69 *Nordic Journal of International Law* 501.

¹⁰¹ <https://www.legislation.gov.au/Details/C2008B00054>

¹⁰² <http://www.statedevelopment.sa.gov.au/news-releases/all-news-updates/reparations-scheme-for-sas-stolen-generations>

¹⁰³ Mottier Véronique and Gerodetti Natalia 'Eugenics and Social Democracy: Or, How the European Left Tried to Eliminate the « Weeds » From Its National Gardens' (2007) 20 *New Formations* 35.

¹⁰⁴ Cuneen 2005 as above.

effects of a successful case in relation to other coercive welfare measures in recent social history predominated the debates.

The Swiss response to compensation claims for coerced sterilisations can only be described as a legalistic approach to a gendered historic injustice claim, and defended by lawyer-politicians who made up the steering commission during a period marked by a strong populism in politics and media coverage. The puzzle as to how to litigate past wrongs dominated over considerations of transformed historical sensibility, human rights, duties of care or the roles and responsibility of the democratic state. The key concepts were compensation and indemnity rather than, as has been the case in other contexts such as South Africa, reparation and reconciliation. Although the term *reparation* entered the political discussion in Switzerland it was pragmatically used to pursue *compensation claims* rather than being at the basis of a discussion about *collective responsibility* which could lead to wider acknowledgment and a public apology. Crucially, it concerned a claim affecting predominantly women (unlike the removal of Jenisch children which had previously undergone a recognition struggle and since then the Contract Children which are currently undergoing a recognition struggle).¹⁰⁵

Eugenics can be seen as a utopia with an explicit temporal vision aiming to improve the gene pool of the national collective. The body of thinking and practices emanating from it had a clear future beneficiary, that is, present and future societies. For those trying to clearly separate the past from the present, this is an uncomfortable element and one which incurs a responsibility to present day society. In missing a (first) opportunity at partial restoration, the rejection of either material or symbolic forms of restitution constitute a rejection of recognising gendered welfare injustices and, as Thompson proposes, unremembered, unacknowledged and un-redressed historical injustice cannot help but demoralise the common life of a nation.¹⁰⁶ This is perhaps

¹⁰⁵ For a full chronology see also: http://www.fuersorgerischezwangsmassnahmen.ch/de/2015-12-04_mm_botschaft.html

¹⁰⁶ Thompson 2002 as above.

particularly pertinent to a nation that was reluctant to provide women with basic political rights.¹⁰⁷

The recognition and compensation of individual injustices is part and parcel of a politics of recognition and reconciliation and redemption, at least in gesture. In terms of being a question of national belonging and citizenship, collective acknowledgment and reconciliation struggles ought not to depend merely on the size and prevalence of discriminatory practices but also of their symbolic value. In this sense, reconciliation debates raise questions about democracies and their understanding of inherited burdens and rights and about whose reparation claims get heard – and succeed – while providing opportunity for collective reflexivity in late modernity about the relationship of the present to our past.

It is, perhaps, worth to return to Nancy Fraser's seminal thinking on the quest for justice and her different ways of conceptualizing such undertakings.¹⁰⁸ The dilemmas of justice in what she calls a post-Westphalian world must explicitly come to terms with the central political questions of the *who*: whose interests count, who decides who counts, whose voices get heard, who is included among the decision-makers, to whom we have duties, and so on.¹⁰⁹ These bare questions have much bearing on ideas and practices of reparation even though, having expanded her conceptual framework from recognition and redistribution to include questions of representation, Fraser's characterization of 'abnormal justice' is much more focused on justice in relation to changing and challenging spatialities, rather than about justice in relation to temporalities.¹¹⁰ Adding the dimension of time and past injustices, and alongside that,

¹⁰⁷ Swiss women did not receive full political rights until 1971.

¹⁰⁸ This section arises from a guest talk by Nancy Fraser at the university of Leeds, UK, in a paper entitled 'Who Counts? Dilemmas of Justice in a Postwestphalian World' in 2009 and is more fully developed in Fraser 2009 as above. See also, Fraser Nancy and Honneth Axel *Redistribution or Recognition? A Political-Philosophical Exchange* Verso London (2003); with Axel Honneth *Justice Interruptus: Critical Reflections on the Postsocialist Condition* Routledge London (1997).

¹⁰⁹ Fraser 2009 as above.

¹¹⁰ In relation to historic injustices by colonialist regimes and imperial ventures Fraser's work has been taken to be useful in asking questions about the usefulness of representation and frame-setting *at the time* yet overriding this is the actual exploitation and violation of the colonial and imperial subject population, making it thereby a question of redistribution. Thus, while Fraser undertakes a rethinking of

a critical 'genealogy of the present'¹¹¹ has framed the arguments of this paper.

An attempt to answer Fraser's numerous *who* questions yields some gendered answers, and different jurisdictions have had different versions of answering these. Feminist transitional justice approaches have already revealed the ways in which 'webs of gendered harm' have had a more difficult stand in reparation claims.¹¹² Acknowledging the historic injustices of coerced sterilisations has been a shorter process in Sweden than elsewhere, not surprising perhaps given its general perspective of gender and gender equality. Switzerland's political engagement, by contrast, was more dismissive of reparation yet has found itself having to deal with reparation questions more as a result of having to embark on a much longer and wider framed social and public debate on coerced welfare measures.

The initial Swiss political framing of the reparation claim resulted in an overly legalistic approach making recourse to the (non) applicability of international law and human rights to past practices. The current attempt at reparation has, by contrast, had a wider reception by both media and the public, and has been driven by people who have been affected by past coercive welfare measures. But in addition, it is happening against the backdrop of the attempt of the previous decade which despite its lack of success perhaps provided a necessary discursive platform for an eventual success. A Swiss law on reparation for coercive welfare measures looks likely to pass in one form or another in 2016 which is billed to have coerced sterilisations included.¹¹³

Those welfare practices that were explicitly gendered are now subsumed within a larger catalogue of coerced welfare measures. The current situation is much more hopeful with regards to arriving at financial compensation within the next few years,

a critical democratic theory of justice and continuously asks questions about the borders and boundaries (and their relevance) of nations, jurisdictions and responsibilities, this question is never expanded, or so it seems, to ask whether this is not merely about spatiality and geographies but also about time and temporalities.

¹¹¹ Foucault Michel *Madness and Civilization: A History of Insanity in the Age of Reason* London Routledge (2001 [1961]).

¹¹² O'Rourke 2013 as above.

¹¹³ 15.082 BBL 2016 101 as above.

yet at the same time the gendered nature of some practices is now subsumed within a larger category of injustice against marginalized people – with gender barely mentioned. With gender implicit, rather than explicit, the misrecognized object in a history of the present, using the genealogical critique mapped out by Foucault,¹¹⁴ remains mapped onto the three forms of injury: one, the coerced sterilisation experienced by women in the context of protectionist welfare measures, second, the concomitant but enduring effects of stigmatization and the management of a *spoiled identity* and third, resulting from the long public debate about reparation, a rejection in the present. The question to be posed is perhaps not just whether reparations claims are gendered, but whether gender based reparation claims take longer.

¹¹⁴ Visker 1995 as above at 22.